UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CITY OF AUBURN, MAINE,	)	
	)	
Plaintiff	)	
	)	
v.	)	*Civil No. 89-0020 P*
	)	
CONSUMAT SYSTEMS, INC.,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

In this diversity action the plaintiff claims that the defendant breached certain contractual and warranty obligations and was negligent when it failed to properly design, construct, operate, repair and maintain a dust-handling system for a solid waste-to-energy recovery facility. The defendant argues that it is entitled to summary judgment or partial summary judgment for these reasons: (1) the plaintiff has waived all claims unrelated to the dust-handling system; (2) the statute of limitations has run on this action; (3) the plaintiff's claims have been satisfied by funds retained by it; and (4) partial summary judgment should be granted and the dispute settled in arbitration.

The defendant contends that it is entitled to summary judgment on all claims which the plaintiff has admitted it will not pursue at trial. It argues that the plaintiff admitted in its answer to defendant's interrogatory #43, *see* Plaintiff's Answers to Defendant's Second Set of Interrogatories #43 (found at Exh. M to Defendant's Motion for Summary Judgment Or, In the Alternative, Partial Summary Judgment), that it will pursue only the claim that the defendant failed to supply workable dust-handling

equipment.[1] It contends that there are no genuine disputes as to the negligence, breach of warranty and other contractual claims. *See* Defendant's Memorandum of Law in Support of Motion for Summary Judgment Or, In the Alternative, Partial Summary Judgment at 2. The plaintiff asserts that it has not waived any of these issues, but that it has merely focused its suit on the defendant's failure to adequately provide a critical component of the facility.

[1] The relevant part of the defendant's answer to interrogatory #43 states: ``The City intends to pursue only that part of its claim against Consumat which is based on Consumat's failure to build, operate and maintain a system that would safely and economically burn pionite dust."

I agree with the plaintiff's characterization of this alleged ``admission." Nothing in the plaintiff's answer to defendant's interrogatory #43 indicates that the plaintiff is waiving its negligence and breach of contract claims relating to the dust-handling system. Although it is clear from the plaintiff's response to defendant's interrogatory #43 that it intends not to pursue other issues alleged in its Amended Complaint,[2] this statement alone is insufficient to support the defendant's motion for summary judgment. One function of interrogatories is ``to narrow the issues and thus help determine what evidence will be needed at the trial." 8 C. Wright & A. Miller, *Federal Practice and Procedure* ' 2162 at 485 (1970). However, the plaintiff's answers to defendant's interrogatories do not necessarily limit the scope of its action. ``The court in a proper case may limit the proof in the light of the answers to interrogatories, but it is not required to do so." *Id.* ' 2182 at 578. Thus, to prevail on its motion the defendant must still ``show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This the defendant has not done. It has failed to submit any evidence or legal theory to support its motion. Accordingly, I conclude that the defendant has failed to show that it is entitled to a judgment as a matter of law on these issues.

The defendant next contends that the plaintiff's claim is barred by the applicable statute of limitations. It asserts that the plaintiff's cause of action arose in July, 1982 and that the plaintiff failed to file its claim within the four-year period required by 11 M.R.S.A. ' 2-725(1), the Maine Commercial Code (``UCC") limitations provision governing contract actions involving the sale of goods.[3] The

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[2] It is also alleged in the Amended Complaint that the defendant failed to design, build and operate a facility which is capable of processing typical municipal refuse and industrial waste. *See* Amended Complaint && 9-10, 20.

[3] Section 2-725(1) states in relevant part: ``An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued."

plaintiff argues that its claims arose on January 1, 1985, that the limitations period applicable to its negligence claim is six years, *see* 14 M.R.S.A. ' 752, and that its breach of contract claim is governed not by the UCC but, because the contracts at issue were under seal, the twenty-year period provided for in 14 M.R.S.A. ' 751.

The defendant argues that the plaintiff's claims arose in July, 1982 when a fire broke out in the dust-handling system because the plaintiff then knew or should have known that the defendant could not comply with the contract. The plaintiff contends that its claims arose on January 1, 1985 when the defendant failed to deliver, pursuant to its contractual obligations, a working dust-handling system. In Maine ``a cause of action sounding in contract accrues when the contract was breached and a cause of action sounding in tort accrues when the plaintiff sustains harm to a protected interest." *Chiapetta v. Clark Assoc.*, 521 A.2d 697, 699 (Me. 1987) (citations omitted); *see also* 11 M.R.S.A. ' 2-725(2).

On a motion for summary judgment the moving party:

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ``the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). Here the defendant has failed to inform the court of any evidence which demonstrates the absence of a genuine issue of fact that the plaintiff's claims accrued in July, 1982. On the contrary, the evidence in the record establishes that the plaintiff's causes of action did not arise before until January 1, 1985 when the defendant turned over operation of the plant to the plaintiff. The turnkey construction contract between the parties required the defendant to design, construct and operate a workable dust-handling system. *See* Affidavit of Robert F. Belz, Jr. In Support of Plaintiff's Objection to Defendant's Motion for Summary Judgment && 7, 14 and Exhs. 3, 5-7 attached thereto; Deposition of Charles Morrison

(taken February 3, 1990) at pp. 5-7. After July, 1982 the parties amended their original contract three times to allow the defendant additional time to complete the project. Affidavit of Robert F. Belz, Jr. && 10, 16 and Exhs. 5-7 attached thereto. When the plaintiff took over the facility on January 1, 1985 the dust-handling system was not operating. Deposition of Charles Morrison (taken February 3, 1990) at p. 15. Accordingly, I conclude that the plaintiff's causes of action arose no earlier than January 1, 1985.

Because I am persuaded that the plaintiff's claims did not accrue before January 1, 1985 it is unnecessary to determine which one or more of the four-, six- or twenty-year statutes of limitations apply. The plaintiff filed its complaint on January 3, 1989. *See* certified copy of Docket No. CV-89-1 Superior Court of Maine, Androscoggin County (attached to May 17, 1990 letter from Catherine R. Connors docketed in this case as #41). If the court were to apply the four-year statute of limitations, January 3, 1989 would have been the last day upon which a complaint could be filed. *See* Me. R. Civ. P. 6(a).[4] Thus, the plaintiff's filing of its complaint was timely regardless of which statute of limitations

[4] The federal rules govern procedure after removal to federal court. *See* Fed. R. Civ. P. 81(c). Accordingly, the Maine civil rules govern the computation of time prior to removal. Me. R. Civ. P. 6(a) states in relevant part:

this court adopts. I conclude, therefore, that the defendant has failed to establish that it is entitled to judgment as a matter of law on the limitations issue. Fed. R. Civ. P. 56(c).

> In computing any period of time prescribed . . . by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a holiday.

Id. Here, the expiration date of the four-year statute of limitations fell on Saturday, December 31, 1988. January 1, 1989 was a Sunday and January 2, 1989 was a legal holiday. Thus, January 3, 1989 was the ``next day'' on which the plaintiff could file its complaint.

The defendant next argues that the plaintiff's claim has been satisfied by the funds the plaintiff retains. The defendant has addressed this assertion in only the most superficial manner.[5] *See* Defendant's Memorandum in Support of Motion for Summary Judgment Or, In the Alternative, Partial Summary Judgment at 9. After a full review of the defendant's argument, I conclude that this contention is without merit. The defendant has not cited any case law or proposed a legal theory to support its assertion. In addition, the defendant has not submitted any evidence indicating that the retained funds were recognized as constituting the outer limit of the plaintiff's damages. Rather, the original contract provides that the plaintiff shall retain 10% of the total contract price until the facility is accepted. *See* Contract Article X, Exh. 3 to Affidavit of Robert F. Belz, Jr. The parties later amended the contract to provide that the plaintiff could release part of this retainage upon completion of different phases of the project, but specifically agreed that ``[n]othing contained [in the amended contract] shall be construed or be deemed to constitute a waiver by the [plaintiff] of any existing default in performance by the [defendant] of its obligations under the Facility Contract." Exh. 6, at pp. 1, 7-9, to Affidavit of Robert F. Belz, Jr. (Agreement to Amend Facility Contract). Because the defendant never completed the dust-handling system the plaintiff did not release the retainage relating to that phase of the project. *See* Affidavit of Charles A. Morrison In Support of Plaintiff's Objection to Defendant's Motion for Summary Judgment & 23. The defendant has failed to submit any evidence to the contrary. I therefore conclude that the defendant has failed to establish an essential element of its contention that the retainage satisfies the plaintiff's claims.

[5] It is well settled that ``issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Collins v. Marina-Martinez*, 894 F.2d 474, 481 n.9 (1st Cir. 1990). However, because the plaintiff fully briefed this issue I have decided to address it on the merits.

Finally, the defendant argues that the court should grant partial summary judgment the effect of which permits the parties to resolve their dispute through arbitration pursuant to the contract. *See* October 4, 1979 Contract Article XVII, Exh. 3 to Affidavit of Robert F. Belz, Jr. The defendant, however, has not made a motion to stay these proceedings pending arbitration, *see* 9 U.S.C. ' 3, nor is there any indication in the record that the defendant has ever attempted to implement the contract's arbitration clause. In addition, the defendant has failed to cite any authority which supports the proposition that the court should grant partial summary judgment in order to allow the parties to arbitrate.[6] I conclude that the defendant has failed to advance any theory which would allow this court to grant a partial summary judgment in its favor based on the construction contract's arbitration clause.

For the foregoing reasons, I conclude that the defendant has failed to meet its burden of establishing ``that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Accordingly, I recommend that the defendant's motion for summary judgment or, in the alternative, partial summary judgment be ***DENIED***.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days

[6] The plaintiff argues that the defendant has waived its right to arbitrate by participating actively in the litigation and failing to request arbitration. *See, e.g., Jones Motor Co. v. Chauffeurs, Teamsters & Helpers Local Union No. 633 of New Hampshire*, 671 F.2d 38, 42 (1st Cir. 1982). I do not address the waiver issue, however, because there has been no formal request to stay these proceedings pending arbitration. *See* 9 U.S.C. ' 3.

after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 1st day of June, 1990.

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David M. Cohen
United States Magistrate